NO. 2243

United States

Circuit Court of Appeals

For the Ninth Circuit

DUVAL JACKSON,

Petitioner.

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Bankrupt.

Respondent.

In the Matter of THE LANE LUMBER COMPANY, LIMITED, a Corporation, Involuntary Bankrupt.

On Petition for Review From the United States District Court for the District of Idaho, Northern Division.

Brief of Respondent, Samuel L. Boyd, Trustee on Review

E. N. LA VEINE,
Coeur d'Alene, Idaho.
Attorney for Respondent.

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STATEMENT OF THE CASE.

Samuel L. Boyd, trustee herein, on February 6th, 1912, filed a duly verified petition praying for an order permitting him to sell at private sale, free and clear of all liens and encumbrances, the real and personal property of the bankrupt; on February 7th, 1912, the Referee herein caused due and legal notice to be given to all of the creditors and lien claimants of the bankrupt setting the hearing on said petition for February 20th, 1912; on February 20th, 1912, upon application of some of the creditors of the bankrupt said hearing was continued to February 24th, 1912; on February 24th, 1912, the hearing was had on said petition by virtue of said notice;

That on March 2d, 1912, an order was made and entered herein approving and authorizing the private sale, either as a whole or in parcels, free and

clear of all liens and encumbrances, of all of the real and personal property of the bankrupt, by the trustee, subject to the approval of the Court, after due notice to all creditors; (Transcript pp. 30 and 31.)

On June 24th, the trustee received from the petitioner, Duval Jackson, two bids, called proposals, for the purchase of all of the real and personal property of the bankrupt for the consideration of One Hundred Forty Thousand Dollars ($140,000), with a deposit of Two Thousand Dollars ($2000) in cash, earnest money, as evidence of his good faith; (Transcript pp. 7 to 21).

On June 27th, 1912, the trustee, having accepted said amount offered, filed a petition for the confirmation of the sale made by him; (Transcript pp. 21 to 25).

On July 1st, 1912, in accordance with the prayer of your said trustee's petition, the Referee herein gave notice to all creditors of the bankrupt of said sale, which was made returnable on July 15th, 1912, at 11 o'clock, a. m.; (Transcript pp. 25 to 27.)

There is no dispute as to the facts set forth in Duval Jackson's petition, (Transcript pp. 4 to 7), and your trustee's answer thereto; (Transcript pp. 36 to 39.)

It is conceded that Duval Jackson well knew that on August 1st, 1912, there would be due and payable to the Northern Trust Company of Chicago, Illinois, the sum of Twelve Thousand Five Hundred Dollars ($12,500), and interest, on the bonded in-

debtedness of the bankrupt and he further knew that the trustee had no money on hand with which to pay said indebtedness and that the trustee was relying upon the fulfillment of his purchase in order to raise said sum for said purpose; that the trustee did everything on his part to be done as required by said proposals to purchase; that nothing was done by the trustee to affect the title of the property covered by petitioner's bid until after the petitioner withdrew his bid; that the reason the trustee demanded and received Two Thousand Dollars ($2000) earnest money from said Duval Jackson was to assure this estate of the good faith of said Duval Jackson; that it was agreed between the trustee and said Duval Jackson if said sale was not consummated on account of any fault on the part of Duval Jackson that he should forfeit the said Two Thousand Dollars ($2000), which agreement was set forth in writing and is a part of the bids. (Transcript pp. 37 and 38.)

It is not contended that the trustee did not do everything on his part to be done under said proposals and bids:

Notwithstanding the good faith on the part of the trustee, ten days after notice had been given to the creditors of the bankrupt, and all the machinery of the bankruptcy court had been set in operation in order to confirm said sale, the trustee received the telegram marked Exhibit "E," (Transcript p. 26).; the Referee also received about the same time a telegram marked Exhibit "F," (Transcript p. 27.)

On the morning of July 15th, 1912, before 11 o'clock, the hour set for the confirmation of said sale, the petitioner caused the written withdrawals to be filed marked Exhibits "G" and "H," (Transcript pp. 27 to 31.); the trustee feeling that the petitioner was going to go back on his contract, and knowing that if he did, that on August 1st, 1912, there would be due and payable on the bonded indebtedness of the bankrupt, Twelve Thousand Five Hundred Dollars ($12,500), and interest, which sum he did not have on hand to meet said indebtedness, he made a strenuous effort to obtain a purchaser for a sufficient amount of the assets of the bankrupt to take care of said installment in the event the petitioner failed to consummate his deal, and pay the installment due thereunder, in order to avoid litigation and additional expense to the estate;

The trustee procured a purchaser for the lumber, lath and molding owned by the bankrupt, who bid Twenty-one Thousand Dollars ($21,000), and filed a petition for the confirmation of the sale on July 12th, 1912, and had the hearing thereon set for July 26th, 1912, eleven days after the date set for the Duval Jackson confirmation; (Transcript pp. 32 to 36).

The trustee also procured a purchaser for 300,000 feet of cedar logs at $7.00 per M., and filed a petition for the confirmation of the sale on July 15th, 1912, and had the hearing thereon set for July 26th, 1912; (Transcript pp. 30 to 33.)

Observe that the day set for these confirmations was eleven days after the date set for the confirmation of the Duval Jackson bids;

On July 15th, 1912, pages 1188 to 1190 of the record show what transpired, the creditors offered no objection to the confirmation of the sale to Duval Jackson for One Hundred Forty Thousand Dollars ($140,000), as per his bid; the trustee instead of assuming the burden of showing his right to said Two Thousand Dollars ($2000), retained said sum and shifted the burden to Duval Jackson, consequently this proceedings commenced before the Referee who held adverse to the trustee, on review the Referee was reversed by the District Judge and the trustee's position sustained, from which latter ruling the petitioner, Duval Jackson, takes this review:

On July 15th, 1912, the order confirming the private sale of the real and personal property of the bankrupt to Duval Jackson, excepting the lumber, lath and molding, and 300,000 feet of cedar logs, above referred to, was made and entered; (Transcript pp. 30 to 33).

The proceeding was so conducted to show the bona fides of the trustee and to enable Duval Jackson to complete the purchase of the remaining assets of the bankrupt and thereby not lose the Two Thousand Dollars ($2000) earnest money deposited.

No objections were made by Duval Jackson to the manner in which the court handled the transaction;

Duval Jackson, after he returned to Kansas City, his home, decided that he could not see the purchase through and pay the amount bid, hence his demand as per his petition filed herein on October 7th, 1912; (Transcript pp. 4 to 8.)

Now referring to Duval Jackson's "PROPOSAL TO PURCHASE PROPERTY," marked Exhibit "A" of his petition. (Transcript pp. 7 to 15.)

On page 12, twelfth line, we find: "I DEPOSIT WITH YOU AT THIS TIME THE SUM OF ONE THOUSAND DOLLARS ($1000) AS EVIDENCE OF MY GOOD FAITH, ETC."

On page 14 fourth line, we find: "SHOULD THIS PROPOSAL TO PURCHASE BE ACCEPTED BY AND APPROVED BY THE COURT, IT IS WITH THE DISTINCT AND EXPRESS UNDERSTANDING OF ALL PARTIES CONCERNED THAT THE DAMAGE FOR FAILURE ON MY PART TO COMPLETE THE FULFILLMENT OF ANY PART OF THIS PROPOSAL IS TO BE LIMITED TO SUCH PAYMENTS AS HAVE BEEN MADE."

Now referring to Duval Jackson's "PROPOSAL TO PURCHASE PROPERTY" marked Exhibit "B" of his petition. (Transcript pp. 14 to 21.)

On page 18, seventh line from the bottom, we find: "AS AN EVIDENCE OF MY GOOD FAITH IN MAKING THIS BID, I HAND YOU HEREWITH THE SUM OF ONE THOUSAND DOLLARS ($1000), etc."

On page 20, eleventh line, we find: "SHOULD THIS PROPOSAL TO PURCHASE BE ACCEPTED BY YOU AND APPROVED BY THE COURT, IT IS WITH THE DISTINCT AND EXPRESS UNDERSTANDING OF ALL PARTIES CONCERNED THAT THE DAMAGE FOR FAILURE ON MY PART TO COMPLETE THE FULFILLMENT OF ANY PART OF THIS PROPOSAL IS TO BE LIMITED TO SUCH PAYMENTS AS HAVE BEEN MADE."

Now on July 15th, 1912, at 11 o'clock a. m., the court and creditors were ready and willing to confirm said sale of Duval Jackson and so indicated to the court, see record above referred to.

Duval Jackson deposited with the trustee the Two Thousand Dollars ($2000) sought to be recovered, in order to show his "GOOD FAITH" as expressed in his bids.

ARGUMENT.

It is necessary to except to certain portions of the petitioner's Statement of Case for the reasons that they are not borne out by the record:

First. On page 2 of petitioner's brief we find the following: "The trustee did not at this time or any time subsequently accept the offer of Duval Jackson, but he did petition the court, praying that a sale for said amount be confirmed."

In the trustee's PETITION FOR CONFIRMATION OF SALE OF BANKRUPT'S REAL AND PERSONAL PROPERTY, on page 20 of the

transcript, we find the following recitation which is not disputed:

> "That on February 6th, 1912, your petitioner filed a petition for the sale of the real and personal property herein; that thereafter, after due notice to all creditors, this court on March 2d, 1912, made and filed an order "Approving and Authorizing Private Sale of the Real and Personal Property by the Trustee, Subject to the Approval of the Court, After Due Notice to all Creditors;"

It cannot be disputed that he had authority to sell. After he had sold the property to Duval Jackson, he submitted the sale to the court for confirmation. On page 23 of the transcript, in the same petition, the trustee says to the court:

> "That in order to deliver said property to the pruchaser it is necessary for your petitioner to have given ten days' notice, as required in the order of sale herein, given to all the creditors, so that the creditors herein may determine whether or not they desire for said sale to be confirmed by this Court."

On the same page, the next two paragraphs, the trustee pleads with the court to confirm the sale in the following language:

> "Your petitioner is of the opinion and verily believes that a larger sum than is above bid cannot be obtained, and advises that the said real and personal property be sold and delivered to

the bidder, for the reason that said sawmill, planing mill and personal property have been and are rapidly deteriorating in value; that the estate has been and is now to considerable expense in keeping said property insured from fire, paying the taxes thereon, and in keeping watchmen to protect the same; that this estate cannot be kept intact any longer without great expense and risk from fire; all of which expense will continue unless said sale is confirmed and the property converted into money."

"That in the opinion of your petitioner, said estate is unlikely to produce better results and he verily believes that each of the proposals to purchase should be accepted and the sale confirmed."

Second. On page 3, of Petitioner's Brief, four lines from bottom, we find the following: "This petition was brought on for hearing on the answer of the trustee admitting the facts set forth in the petition, etc." Petitioner overlooked the fact that the Findings of Fact recite: "from the facts presented by the pleadings, all allegations therein not denied being admitted by the parties." See paragraphs 2 and 6, (Transcript pp. 36 to 39), of respondent's answer which sets up new facts as follows:

2.

"Admits paragraph two, but alleges that the reason and only reason your trustee and this court did not confirm the bids made by the pe-

titioner in full was on account of his withdrawal before the time set for confirmation, that the proposals to purchase submitted by petitioner provided:

'Should this proposal to purchase be accepted by you and approved by the Court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal, is to be limited to such amounts as have been made."

6.

"Admits paragraph six, but alleges that the reason therefor is set forth in the petition for confirmation of the sale of the lumber belonging to the bankrupt filed herein on July 12th, 1912, and as set forth in the petition for confirmation of the sale of 300,000 feet of cedar logs, at $7.50 per M., belonging to the bankrupt, filed herein on July 30, 1912.

"Further answering said petition your trustee alleges that said Duval Jackson well knew that on August 1st, 1912, there would be due and payable to the Northern Trust Company of Chicago, Illinois, the sum of Twelve Thousand Five Hundred ($12,500) Dollars and interest, on the bonded indebtedness of the bankrupt, and he further knew that your trustee had no money on hand with which to pay said indebtedness and that your trustee was relying upon the ful-

fillment of his purchase in order to raise said sum for said purpose; that your petitioner did everything on his part to be done as required by said proposals to purchase; that nothing was done by your trustee to affect the title of the property covered by petitioner's bid until after the petitioner attempted to withdraw his bid; that the reason your petitioner demanded and received Two Thousand Dollars ($2000) earnest money from said Duval Jackson, was to assure the estate of the good faith of said Duval Jackson; that it was agreed between your trustee and said Duval Jackson if said sale was not consummated on account of any fault on the part of Duval Jackson, that he should forfeit the said Two Thousand Dollars ($2000), which agreement was set forth in writing and is a part of the bids."

These admissions referred to in the findings, were made in open court by Messrs. Reed & Boughton, for the petitioner, and Mr. La Veine, for the trustee.

This fact should be borne in mind throughout the discussion: It is undenied, either in the pleadings or the brief that the trustee, as trustee, did and performed everything that was required of him under the contracts, called "proposals." That on July 10th, 1912, five days before the day set for confirmation, after notice to creditors had been given of the proposed confirmation, Duval Jackson gave notice

of forfeiture of his contract by withdrawing the bids, without any reason therefor, (Transcript pp. 26 and 27.) Petitioner's Brief, page 3, lines 4 to 12.

Who was guilty of the first breach of the contract between the trustee and Duval Jackson? Duval Jackson.

This court should refuse to permit the first person guilty of a breach to compel the trustee to refund the Two Thousand Dollars ($2000).

The records of the court will bear me out in the following statement. The assets of the bankrupt for which Duval Jackson bid $69,519.40, have been sold at forced sales to meet the bonded indebtedness and costs of administration for the following sums:

Lumber, etc., referred to in Order Confirming sale to Duval Jackson	$21,000.00
Logs, to Harrison Shingle Co	1,177.47
Logs, to McGoldrick Lbr. Co	4,091.43
Railroad and Equipment	3,700.00
Remainder, except assets referred to in Exhibit "B"	22,000.00
Total	$51,968.90

Deducting $51,968.90 from $69,519.40, bid by Duval Jackson, makes a total loss, to the estate of $17,550.50. This is an enormous sum for the estate to lose and had not Duval Jackson protected himself with the following clauses in his proposals the trustee would now be suing him for the $17,550.50:

"Should this proposal to purchase be accep-

ted by and approved by the Court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal is to be limited to such payments as have been made." (Transcript, p. 14, Exhibit "A," lines 4 to 9 inc.)

"Should this proposal to purchase be accepted by you and approved by the court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal is to be limited to such payments as have been made." (Transcript, p. 20, Exhibit "B," lines 11 to 17 inc.)

With reference to the authorities cited by petitioner, in support of his contention, we will take each citation and point out its failure to apply to the facts presented in this action.

9 Cyc. 284-5-6-7 is cited.

This citation deals with *offer*. Jackson's offer was accepted by the trustee for the estate when he took the $2000. He was agent of the court. The court and each and every creditors stood ready and willing to ratify his act on July 15th, 1912, in every detail, and the record bears out this statement. Jackson did not want the court to confirm the sale and placed the court in a most embarrassing position. Are courts going to permit this trifling?

The above citation in Cyc. shifts to *auc-*

tions. This was not a sale at auction. Not a verbal bid. It was a contract between Duval Jackson and the trustee. The trustee performed every covenant to be performed by him and so did the court, consistent with good business judgment. The hammer went down, to use the auctioneer's phrase, when the trustee accepted the $2000. The trustee spoke first, ~~and~~ when he filed his petition for confirmation, and even under the auctioneer theory, Duval Jackson ~~is~~ was estopped from claiming the $2000.

Duval Jackson promised to pay the money to the estate. It was his offer. On page 287, supra, we find: "The promisor is bound, but the promisee need not take advantage of the promise unless he chooses." The trustee chooses to hold the money for the breach.

Martin v. Hudson, 22 P. 292 (Cal.) cited by petitioner is not in point because:

1. No consideration whatever in said case ever passed from the plaintiff to the defendant.

2. It was a mere proposal or offer to sell.

In this case Duval Jaskson paid $2000 on the purchase price, it was a contract between him and the trustee which Duval Jackson prevented the court from confirming in toto. The court was ready and willing to confirm the sale on July 15th, 1912, the earliest possible time under the bankruptcy practice.

Sherwin v. National Cash Register Co. 38 P. 392 (Colo.)

This case is based on a written order signed by Sherwin for a cash register. No money was paid on

the purchase. He gave notice to the Cash Register Company of withdrawal before they accepted the order.

Page on Contracts, cited by petitioner, is not in point because, Page contemplates failure to accept. The offer was accepted by our trustee, there was a meeting of minds. The trustee is the court's right arm for converting estates into cash.

Scanlon v. Oliver, 44 N. W. 103 (Minn.) is not reported where cited and we have been unable to locate it.

9 Cyc. 265-7-8, cited by petitioner, are quite general and the law therein referred to does not contemplate that the first breach was made by the person seeking relief, as is the condition in this proceeding.

Counsel for petitioner asks the following question:

> "Suppose, for instance, that the petitioner, instead of depositing $2,000.00 on his offer had specified in his written offer that as an evidence of good faith, he was depositing the entire purchase price. Would any one contend for a minute that where the offer was withdrawn prior to the acceptance, that the entire purchase price could be restrained." (Petitioner's Brief, p. 10, lines 10 to 16 inc.)

We certainly contend that had Duval Jackson paid the trustee the entire purchase price, under the facts in this case, he could not go back on his bargain and demand it simply because he had changed his

mind. If he could what would the words "sale" and "earnest money" mean?"

Trustees would never have any assurance that they could rely upon having funds with which to conduct the administration of bankrupt estates.

Blossom v. Milwaukee R. R. Co., 1 Wallace 656; 17 L. Ed. 673, we do not contend is in point.

Tillman v. Dunman, Executor 114 Ga. 406; 57 L. R. A. 784, was a sale at auction by an executor.

Camden v. Mayhew & Co., 129 U. S. 73, 32 L. Ed. 608, we do contend is in point and we will discuss it when we array our authorities.

In re American Copper Co., 183 F. 556, is not in point in any particular.

In paragraph 2 on page 12 of Petitioner's Brief, a statement of law is laid down which is altogether too broad when applied to bankruptcy sales. See Sturgis v. Corbin 141 F. 1, 72 C. C. A. 179, 15 Am. B. R. 543.

"The failure of one party to perform will discharge the other, and so that one cannot maintain an action against the other without showing performance on his part."

9 Cyc. 643, 644, note No. 69 on page 644.

Prior to the enactment of the Bankruptcy Act of 1898, the Supreme Court of the United States in Camden v. Mayhew, et al, in 1889, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608, held:

"Where a purchaser refuses, without cause, to make his bid good, he may be compelled to do so

by rule or attachment issuing out of the court under whose decree the sale is had; it is not necessary that his liability for a deficiency or a resale should be ascertained and enforced by an independent suit."

In 1906, in the case of Mason v. Wolkowick, 150 F. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, this court held: "The trustees petition must be held to have been an affirmance by him,, so far as in his power, etc."

In supra, subdivision 2 of syllabus we find: "Aside from the power of the federal District Court in regard to the assets of bankrupts, which is especially given it by statute, it has all the authority which any court exercising equitable jurisdiction has to protect its receivers and enforce contracts made by them." Also, subdivision 3 of syllabus:

> "Whenever a receiver of a bankrupt, by direction of the court appointing him, makes a sale of assets in his possession, the parties concerned are bound to recognize him as an officer of the court, and hence such court, not only has power to enforce in a summary manner the completion of the contract of sale, but the parties involved are deemed to have consented to such proceedings."

The above rules would apply equally to trustees.

In 1911, this court had occasion to pass upon the question involved in this proceeding, In re Jungmann, Inc. 186 F. 302 (C. C. A.) and cited the above referred to cases of Camden v. Mayhew (U. S.) and Mason v. Wolkowick (C. C. A.)

Under the rule in the last mentioned case it appears conclusive to us that Duval Jackson by voluntarily becoming a purchaser of the Lane Lumber Company property, sold by the trustee at private sale under order of the court, that he submitted himself to the jurisdiction of the court, and when he refused, *without cause,* to carry out his contract he either forfeited his earnest money or laid himself liable to be compelled to perform the contract.

> "An order made by a court of bankruptcy, authorizing a receiver to sell property of the estate at private sale in accordance with an offer made therefor by an outside party, whose counsel was present and assented, rendered the transaction a judicial sale as binding on the purchaser as though his offer had been made and accepted and the sale approved by the court after authority to sell had been given, and, if he refuses *without cause,* to carry out his contract, he may be compelled to do so by rule or attachment issuing out of the court under whose order the sale was made."
>
> In re J. Jungmann, Inc., 186 F. 302 (C. C. A.)

It seems quite apparent that as soon as the trustee accepted the $2000 earnest money from Duval Jackson and filed his petition for confirmation of the sale, that thereupon Duval Jackson became bound:

First. Because the offer to purchase was accepted by the trustee.

Second. Because there was no breach by the trustee.

Third. Because on the return day the court and creditors were ready to confirm the sale in toto had Duval Jackson not made the withdrawals which forced the trustee to start the machinery of the bankruptcy court to sell portions of the estate to meet the installment of $12,500 and interest on the bonded indebtedness due the Northern Trust Company of Chicago, Illinois, on August 1, 1912, referred to in trustee's answer, of which Duval Jackson had notice.

Fourth. Because he has forced this estate to sacrifice $17,550.50.

Fifth. The withdrawals by Duval Jackson showed bad faith on his part.

Sixth. Because it would be a dangerous precedent to set and it would make the administration of estates more and more difficult.

We respectfully submit that the Decree of the Honorable District Judge should be affirmed in its entirety.

Respectfully submitted,,

E. N. La Veine,

Attorney for Respondent, Samuel L. Boyd, Trustee, Coeur d'Alene, Idaho.

Service of the foregoing brief of Samuel L. Boyd, Trustee, is hereby accepted by receipt of copies thereof, this 3rd day of May, 1913.

Attorneys for Petitioners.